SUBJECT INDEX

	Page
Preliminary statement	1
Reply to respondents' statement	2
Argument	5
1. The respondents contend that the Court of Appeals was manifestly right in holding that the District Court exceeded its authority in reducing petitioner's sentences	5
2. Secondly, respondents contend that the Court of Appeals was also correct in holding that the determination by the District Court that petitioner's convictions were vulnerable to collateral attack was without substantial support in the record	9
3. Third, respondents contend that there is no merit to petitioner's claim that the Court of Appeals' decision is inconsistent with this Court's remand in Marchese v. United States, 374 U.S. 101, or with the decision in Sanders v. United States, 373 U.S. 1	12
4. This Court should grant Certiorari herein to settle important questions of law and resolve conflicts in the decisions of the Appellate Court	17
Conclusion	19

TABLE OF AUTHORITIES CITED

Cases	Page
Berger v. United States, 295 U.S. 78	12, 15
Bishop v. United States, 223 F. 2d 582	16
Brown v. Allen, 344 U.S. 443	13
Fay v. Noia, 372 U.S. 391	14, 17
Heflin v. U.S., 358 U.S. 415	14
Hill v. United States, 368 U.S. 424	6
Jenkins v. United States, 325 F. 2d 942	8
Kinsella v. Looney, 217 F. 2d 445	8
Lopez v. United States, 373 U.S. 427	18
Marchese v. United States, 374 U.S. 101	5, 17, 20
Massiah v. United States, 374 U.S. 805	18
McKenna v. Ellis, 280 F. 2d 593	8
Napue v. Illinois, 360 U.S. 264	10, 11, 19
Olmstead v. United States, 277 U.S. 438	16
Powell v. Wiman, 287 F. 2d 275	8
Price v. Johnson, 334 U.S. 266	14
Richard v. United States, 217 F. 2d 452	8
Sanders v. United States, 375 U.S. 1	6, 14
Sherman v. United States, 356 U.S. 369	16
Silverman v. United States, 365 U.S. 505	18
United States v. Hayman, 342 U.S. 205	6
United States v. Hunter, 162 F. 2d 644	7, 8
United States v. Robinson, 361 U.S. 220	7
Waley v. Johnson, 316 U.S. 1	14
Wick v. Keshner, 244 F. 2d 146	17

Rules

Rules of Criminal Procedure, Rule 35	7
Rules of Criminal Procedure, Rule 45(b)	7

Statutes	Page
United States Code, Title 21, Sec. 174	11
United States Code, Title 28, Sec. 2255	2, 3, 5, 6, 7, 8, 9, 18, 19, 20
United States Code, Title 26, Sec. 4704(a)	11
United States Code, Title 26, Sec. 7237	11
United States Code, Title 28, Sec. 2243	5, 6, 7, 9, 18, 19, 20
United States Constitution, Fourth Amendment	13, 15, 18
United States Constitution, Fifth Amendment	13, 15, 18
United States Constitution, Sixth Amendment	18

IN THE

Supreme Court of the United States

October Term, 1965
No. 157

MICHELE MARCHESE,

Petitioner,

vs.

UNITED STATES OF AMERICA, PRESTON SMITH, Warden of United States Correctional Institution at Terminal Island, California,

Respondents.

JESSE DEL BONO,

Petitioner,

vs.

UNITED STATES OF AMERICA, R. W. MAY, Warden of United States Correctional Institution at Terminal Island, California,

Respondents.

REPLY OF PETITIONERS TO RESPONDENTS' OPPOSITION BRIEF.

Preliminary Statement.

Most of the matters covered by the somewhat lengthy brief by the Government,[1] in opposition to the Petition

[1]In this brief the respondents' opposition brief will be referred to by the initials "G.B."; the petition for certiorari as "Pet."; the petition of Marchese for habeas corpus as "M.H.C."; the original petition of Marchese for certiorari in which the Supreme Court granted certiorari, vacated the judgment and remanded the case to the district court for reconsideration as "O.M. Pet."; the Government's brief in opposition thereto as "O.G.B."; Marchese's reply thereto as "O.M.B."; the reporter's transcript of the trial as "T.R.T."; the reporters' transcript at the hearing as "R.T."; and the clerk's transcript as "C.T.".

for Certiorari have been covered by the petition, so we shall in this reply confine ourselves to a brief amplification of the points raised in the petition and the correction of, and argument against, points raised in the respondents' opposition brief.

We wish, however, to call the attention of this Court to the fact that most of the contentions raised by the Government were also raised by its brief in opposition to the Petition for Certiorari filed by Michele Marchese in the October, 1962, term No. 362 in which this Court granted certiorari, vacated the judgment and remanded the case to the Federal Court "for reconsideration in the light of *Sanders v. United States,* 373 U.S. 1 (374 U.S. 101)." Since most of the points raised in the instant proceeding were adversely decided against the Government, it is bound by such decision. Consequently, we respectfully refer this Court to the petition and briefs filed by the parties in that proceeding.

We disagree with the Government as to its statement of the questions presented (G. B. p. 2). We submit that in the petition the questions presented are more adequately set forth (Pet. pp. 7-8).

Reply to Respondents' Statement.

In its statement of the questions presented (G. B. p. 3-4) the Government makes the assertion that the petition of Marchese for a writ of habeas corpus has been treated in these proceedings as, in substance, a second motion under Title 28 U.S.C. 2255 and that the proceeding brought by Del Bono was under the same section. These assertions are not strictly correct. Marchese's petition for habeas corpus could be treated interchangeably under habeas corpus and the motion pro-

cedure. If Sec. 2255 should be determined to be inadequate or ineffective to afford and support the relief granted, the petition should be treated as one for *habeas corpus*. The same is true with respect to Del Bono, since his proceeding was also in the alternative of the motion procedure and *habeas corpus*.

The respondents also are incorrect in their statement (G. B. p. 3-4) that the District Court ruled that "Marchese had been denied a fair trial by reason of the prosecutor's failure to disclose relevant evidence to the Court and jury." An examination of the findings and conclusions of the Trial Court shows clearly that it ordered the petitioner discharged due to the violation of his constitutional rights not only by reason of the failure of the prosecution to disclose relevant evidence, but for other reasons also, to wit:

(a) Use of perjured testimony by Government witnesses.

(b) Type of tactics used by Federal officers to bring about the arrest and conviction of Marchese in order to "get" him, including the consent to and condonation of the violation by Sussman of the narcotics laws of the United States during the investigation.

(c) Use of the transmitting device, known as the Schmidt transmitter, concealed on the person of Sussman, whereby the Government agents outside Marchese's apartment overheard, and over objection of petitioners, were permitted to testify concerning conversations between Sussman and Marchese in the latter's apartment.

(d) Arrest of petitioners, and the search of Marchese's apartment and Del Bono's auto without a war-

rant of arrest or search warrant, although there was ample time to obtain such warrants.

(e) In addition to and because of the above, the District Court determined it would serve the ends of justice to discharge the petitioners on account of their excellent prison records.

As we have pointed out in the petition, the intent of the District Court was to vacate the judgment of conviction and to discharge petitioners for the time served in prison by them amounting to approximately 4½ years, and that the reduction of their sentence to five years was incidental to, and for the purpose of supporting and fortifying, the order of discharge.

The only evidence that Marchese sold drugs to Sussman for four years prior to his arrest was the unsupported statements of Sussman, who was a drug addict and unreliable as a witness not only because of his addiction, but also by reason of his desire to do and say whatever the Federal agents required in order to avoid a long prison term. The evidence that Marchese sold drugs to Sussman arose largely from the conversations testified to by Agent Richards as being overheard through the use of the Schmidt transmitter concealed on Sussman's person (G. B. p. 5; Pet. 10, 20-23) which is assailed as violating Marchese's constitutional rights.

We refer this Court to the *Statement of the Case* in petitioner's (appellees') reply brief before the Circuit Court and to the *Statement of Facts* in this petition (Pet. pp. 9-12) and as well as in Marchese's petition for habeas corpus [C. T. Vol. 2, pp. 6-11] for a detailed statement of the facts herein.

ARGUMENT.

1. The Respondents Contend That the Court of Appeals Was Manifestly Right in Holding That the District Court Exceeded Its Authority in Reducing Petitioner's Sentences.

Before answering this contention, we reiterate that the manifest intention of the District Court was to vacate the judgment of conviction and discharge petitioners for the time served by them, because of the violation of their constitutional rights, and also "to serve the ends of justice." This intended action of the District Court was not only authorized under its discretionary powers granted under habeas corpus proceedings (Title 28, Sec. 2243 U.S.C.) but also under the motion procedure (Title 28, Sec. 2255 U.S.C.) and under the decision of this Court in granting certiorari (*Marchese v. United States*, 374 U.S. 101).

As pointed out in our reply brief before the Court of Appeals (Appellee's Br. 17-19) and in the present petition (pp. 27-32) Judge Thurmond Clarke of the District Court intended to vacate the judgment and discharge petitioners for time served, and the reduction of their sentences to five years was incidental to and to fortify and support his decision against attack on appeal, and it was also done at the request of petitioners' counsel. Through inadvertence the language of Sec. 2255 was not strictly followed, but the last sentence of the judgment in each case may be considered independent of the order of reduction. This is sufficient to comply with the wording of Sec. 2255 and reads as follows:

> "It is adjudged that defendant and petitioner be immediately released from custody" (Pet. App. A(2) and B(2).)

For the sake of argument only, let it be assumed that respondents are correct in their contention that the language of Sec. 2255 does not provide that the District Court may reduce the sentence. We, then, contend it can do so under the construction placed thereon in numerous decisions of this Court that said section is "exactly commensurate" with habeas corpus (*United States v. Hayman*, 342 U.S. 205; *Hill v. United States*, 368 U.S. 424; *Sanders v. United States*, 375 U.S. 1).

The Court stated in *Sanders* on page 15:

> "Indeed, if he were subject to any procedural hurdles which make his remedy under 2255 less swift and imperative than federal habeas corpus, the greatest constitutional doubts would be engendered. We, therefore, hold that the similar relief provision of Sec. 2255 is to be deemed the material equivalent of Sec. 2244. . . . Since the motion procedure is the substantial equivalent of federal habeas corpus, we see no need to differentiate the two for present purposes."

Since the remedy and relief under Sec. 2255 is "exactly commensurate" and the "material equivalent" of habeas corpus, the District Court does have the right, power and discretion, regardless of the apparent language of 2255, to "summarily hear and determine the facts and dispose of the *matter as law and justice require.*" (Title 28, Sec. 2243) *Emphasis added.* There is no restriction placed upon the type of relief which the District Court could grant under Sec. 2243, and hence none also under Sec. 2255.

Again, for the sake of argument only, assume that the District Court could not reduce the sentence and

discharge the petitioners under Sec. 2255. It could, nevertheless, grant such relief under Sec. 2243; and since petitioners were both incarcerated in the territorial jurisdiction of the District Court, said sections could be relied upon interchangeably; and if the relief could be granted under either section, the judgment of the District Court as to the relief granted should be upheld, no matter under which section the District Court judge believed he was acting.

Section 2255 expressly provides for the remedy of habeas corpus if it "appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." (App. G. p. 57). Thus if Sec. 2255 is "inadequate or ineffective" resort may be had in this case to habeas corpus.

However, assert respondents, the District Court had no power to reduce sentences beyond 60 days under Rule 35 of the Rules of Criminal Procedure, and that Rule 45(b) specifically forbids enlargement of this period. (Citing: *United States v. Robinson,* 361 U.S. 220, 223-224 (2); and *United States v. Hunter,* 162 F. 2d 644, 647-648); and that said rule is inflexible and jurisdictional. Respondents' contentions might have merit if an attempt should be made to reduce the sentence, where there were no constitutional rights or questions involved, and where no collateral attack is made on the judgment for violation of constitutional rights.

In the *Robinson* case, there was dicta only in support of respondents' contention as to Rule 35.[2] In the

---

[2]In note 14 of *Robinson* (p. 230) the Court stated:

"The allowance of an appeal months or years after expiration of the precribed time seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral reme-

Hunter case, the judgment was concededly a valid one, and the Appellate Court held that the District Court had no authority to correct or modify a sentence under a *valid judgment* beyond a 60-day period. There was in the *Hunter* case no collateral attack upon the judgment as in the instant case.

In the cited case of *Jenkins v. United States,* 325 F. 2d 942, the defendant pled guilty and sought to have his sentence vacated because he was induced by the Court to change his plea to guilty. The Court found this to be untrue, and denied his petition but still reduced his sentence. In this case as in the other cited case of *Richard v. United States,* 217 F. 2d 452, the judgment was not subject to collateral attack and hence the cases cited by respondents are not applicable.

On the other hand where a collateral attack is made on the judgment under habeas corpus or Sec. 2255 it has been held that the Court had jurisdiction to reduce a sentence even though more than 60 days had transpired since the imposition of the sentence, as we pointed out in the petition (Pet. pp. 12, 33-34), *Kinsella v. Looney,* 217 F. 2d 445; *Powell v. Wiman,* 287 F 2d 275; *McKenna v. Ellis,* 280 F. 2d 593).

Respondents have either ignored or glossed over the holding in said cases. We submit that the rules laid

---

dies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time and to reduce a sentence within 60 days after the judgment of conviction becomes final; the power of a District Court to entertain a collateral attack upon a judgment of conviction, and to vacate, set aside or correct the sentence under 28 U.S.C. Sec. 2255, and proceedings by way of error *coram nobis*".

The above note indicated that the Supreme Court was of the opinion that Sec. 2255 was available even in absence of an appeal where "basic (constitutional) rights" were involved.

down in said decisions that the District Courts under either or both Sections 2243 and 2255 may reduce sentences, and order petitioners discharged for time served in the interest of justice, should be enunciated by this Court in order to settle this important question and resolve any apparent conflicts in the Appellate Court decisions.

2. Secondly, Respondents Contend That the Court of Appeals Was Also Correct in Holding That the Determination by the District Court That Petitioners' Convictions Were Vulnerable to Collateral Attack Was Without Substantial Support in the Record.

We cited in appellees' reply brief before the Court of Appeals specifically, by pages in the Reporters' Transcripts and Exhibits, the evidence in support of each finding of the District Court [C. T. pp. 139-142, App. Reply Br. pp. 53-54]. There is ample circumstantial evidence as well as reasonable inferences from facts established in support of the findings of the District Court. In cases such as this, it is impossible to prove perjury of the so-called "special employees" and the government agents relating to the existence of an agreement between them by direct evidence. Obviously the "special employee" and the Federal agents will (and did) deny the existence of any agreement that the "special employee" would get a lighter sentence in exchange for favorable (to the Government) testimony." We must, therefore look to their conduct to ascertain the true facts. The activities of Agent Richards after he induced and procured Sussman to "cooperate" with Federal agents clearly shows that some "deal" or agreement had been made.

At the hearing, Richards testified as to his activities to obtain leniency for Sussman, which bore great fruit in that Sussman obtained incredible leniency considering his record.[3] Richards also testified that he did not know prior to the time of trial that Sussman was using narcotics regularly and that he never appeared to be under the influence of narcotics. This was in direct contradiction of his testimony at the trial that he knew Sussman was using narcotics during the investigation between January 30th and March 13, 1958. It was also in contradiction of Sussman's own testimony at the trial that he was using narcotics every 4½ hours in amounts valued at $75.00 per day, and was under the influence of narcotics during the entire investigatory period, and that he took narcotics each time before meeting the Federal officers. It is incredible that a narcotics agent of Richards' experience was not aware that Sussman was under the influence of narcotics whenever he met the officers.

The District Court was thus justified in disbelieving Richards' denials of any promise or agreement, and finding that there was some promise, agreement or assurance of some kind given by him to Sussman that the latter would get consideration and lenient treatment if he cooperated.

In *Napue v. Illinois,* 360 U.S. 264, the state's witness Hamer denied that any promise was made or reward offered for testifying. The fact that some promise was made by the prosecutor came out only by fortuitous circumstances, when the prosecutor, then in pri-

---

[3]At the time of the hearing Sussman was not available to be called as a witness since not long after his return to Los Angeles following his release from prison, he died at the U.C.L.A. Medical Center on September 11, 1960, of "acute alcoholism".

vate practice, represented the said state witness in seeking a reduction of the latter's sentence. Even in the *Napue* hearing the attorney attempted to modify his language in the petition filed by him for Hamer and the Illinois Court denied Napue relief on the basis of the attorney's testimony. This Court nevertheless reversed the case.

In the instant case, Richards' activities and his own testimony at the hearing indicated that he had promised Sussman he would try to obtain leniency for him and that he was successful in so doing even before the trial.

It is obvious also that Richards talked to the Assistant U.S. Attorney Bevan concerning the same, since otherwise, Bevan, knowing of Sussman's past criminal record, would not have caused the charge of violating Sec. 174 of Title 21 U.S.C. (which provides for a possible sentence of 20 years *without probation or parole*), to be dismissed and a tax count (Title 26, Sec. 4704(a) and 7237) providing for a sentence of two to five years (*with possibility of parole*) to be submitted and the minimum sentence of two years to be imposed by Judge Byrne.

Not only did Bevan know of Richards' activities and promises or assurances to Sussman, but also of the extreme leniency which had been given to Sussman by Federal and State Courts, prior to the trial of petitioner; yet he stood by and did nothing to disclose these matters and even interposed an objection to the question as to whether there was any "agreement". It was his duty, when Richards testified falsely that nothing was ever said in his presence that Sussman would receive a lighter sentence if he cooperated, to disclose this fact,

to the jury. Bevan knew from his experience as a prosecutor that as a matter of course, through his recommendation and the recommendation of Richards, that Sussman would receive a much lighter sentence than otherwise. Bevan also knew that he had already provided the means of a lighter sentence in the substitution of the charges against Sussman. Yet he did nothing to bring this to the attention of the jury and hence violated the strict requirements of *Berger v. United States,* 295 U.S. 78, page 88.

There was thus ample evidence to support the findings of the Trial Court as to the existence of some promise, arrangement or assurance. The Court of Appeals in holding otherwise went directly contrary to rules with respect to appellate procedure pertaining to the upholding of findings of the Trial Court. We have pointed out how the Appellate Court disregarded these rules, some of which had previously even been enunciated by the Ninth Circuit Court itself in the petition for rehearing (Appendix E, pp. 51-53), and we respectfully call this Court's attention to the same.

3. Third, Respondents Contend That There Is No Merit to Petitioner's Claim That the Court of Appeals' Decision Is Inconsistent With This Court's Remand in Marchese v. United States, 374 U.S. 101, or With the Decision in Sanders v. United States, 373 U.S. 1.

We disagree with this contention. This Court had before it in the previous proceeding, wherein it granted certiorari, the same grounds for the granting of the writ of habeas corpus and the same issues raised by the Government in its opposition, except as to the relief granted by the District Court on remand. In that pro-

ceeding the Court of Appeals upheld the dismissal of Marchese's petition for habeas corpus by Judge Hall without a hearing. (Judge Pierson Hall was not the trial judge, but dismissed the petition *ex parte* in the absence of Judge Thurmond Clarke, the trial judge). This Court then reversed the Court of Appeals and remanded the case to District Court where it came for hearing before Judge Clarke, the proper judge to hear the matter.

One of the issues raesed in said petition for certiorari and in the instant petition, was whether petitioner's constitutional rights were violated by the use of the electronic Schmidt transmitter concealed on Sussman's person by the officers and the admission of testimony of the officers, over objection by petitioners, as to what they overheard. This was a clear violation of the right of privacy under the Fourth Amendment of the Constitution and of due process under the Fifth Amendment.

When petitioners first appealed from the judgments of conviction, the Appellate Court affirmed the judgment without opinion and hence did not pass upon, at least by any opinion, the said issue. This Court then denied certiorari without opinion, but this did not mean approval of the decision of the Court of Appeals.

It has been repeatedly held by this Court that denial of certiorari with no statement of reasons, should be given no weight in passing upon the same petitioner's application for a writ of habeas corpus and such denial imparts no expression of opinion on the merits. *Sunal v. Large, supra,* p. 181, *Brown v. Allen,* 344 U.S. 443, 492, 497. Further, denial of an application for writ of

habeas corpus is not *res adjudicata. Sanders v. United States, supra, Fay v. Noia,* 372 U.S. 391.

When the petition of Marchese for habeas corpus was dismissed, the judgment of dismissal was affirmed by the Court of Appeals, not on the merits of the issue but on the grounds that the issues had been or should have been raised and passed upon by the appeal, and that habeas corpus could not serve as an appeal. The Solicitor General in opposing the petition for certiorari also made the same argument relying on the case of *Sanders v. United States,* 297 F. 2d 735, then pending on certiorari. This Court disposed of such issue by reversing the *Sanders* case and reversing the Court of Appeals in the Marchese case. These decisions are in accord with other decisions of this Court, namely: *Price v. Johnson,* 334 U.S. 266; *Sunal v. Large, supra; Waley v. Johnson,* 316 U.S. 1; *Heflin v. U.S.,* 358 U.S. 415.

In the *Sunal* case, this Court in declaring that habeas corpus cannot be used as a substitute for appeal set forth the exception, "where the error does not trench on any constitutional rights of defendants" (p. 182). In that case Mr. Justice Frankfurter notes many exceptions to the rule contended for by respondents. Thus the Appellate Court cases cited by respondents (G. B. pp. 23-24) being contrary to the decisions of this Court cited above, carry no weight in the instant case, but this Court should clarify this apparent conflict by granting certiorari.

Respondents have glossed over and ignored the violation through the use of the electronic transmitter of petitioner's constitutional rights. This violation alone supported a specific finding of the Trial Court upon

which Conclusion II was based. As quoted in the decision of the Appellate Court (See App. D. p. 28) the Trial Court also concluded that the constitutional rights of Petitioners had been violated under the Fourth and Fifth Amendments. We have discussed this matter (Pet. pp. 20-23) and the failure of the respondents to dispute our contentions, relying only on the technical defense that such matters have been litigated before, indicates that they also believe there was in fact such a violation by the use of the electronic device. Such violation alone was sufficient to support the conclusion of the Trial Court, "That the constitutional rights of petitioners to a fair trial were denied and so infringed upon as to render the judgment subject to collateral attack." (See App. D. p. 28). Even if all the findings of the Trial Court other than that respecting the use of the Schmidt transmitter, were unsupported, the single finding as to the transmitter was sufficient to support the conclusions and judgment based thereon.

However, we submit that there is ample evidence to support other findings as to infringement of petitioners' constitutional rights. In addition to evidence of, (1) the charges of perjury on the part of Sussman and Agent Richards, (2) the suppression by the United States attorney of relevant evidence, or at least his failure to disclose relevant facts with respect to Agent Richards and Sussman as enjoined in the case of *Berger v. United States, supra,* and (3) the arrest of petitioners and search of Marchese's apartment and Del Bono's auto without a search warrant, the Trial Court had before it evidence that the Government agents consented to, acquiesced in and condoned the commission by Sussman of crimes during the investigation, in that

they permitted Sussman to have possession of and use heroin in support of his narcotic addiction. During such period Sussman by his own testimony used narcotics valued at $75.00 a day aggregating during the investigation in excess of $3,000.00. This was certainly what has judicially been termed "dirty business" on the part of the agents.

In *Sherman v. United States,* 356 U.S. 369, at 380, Mr. Justice Douglas quoted from the dissenting opinion of Mr. Justice Holmes in *Olmstead v. United States,* 277 U.S. 438 as follows:

> "It is also desirable that the Government should not itself foster and pay for other crimes when they are the means by which evidence is obtained."

The trial court could and did consider all of such matters in granting the petitions of Marchese and Del Bono. It was not incumbent upon the court as complained by respondents, to state which particular grounds it considered Marchese's conviction to be vulnerable to collateral attack, since it could consider all of such grounds, and if one ground clearly existed, it was enough to support the granting of the petitions and the discharge of petitioners.

As stated in *Bishop v. United States,* 223 F. 2d 582 at 587:

> "A trial judge is not supposed to recite the evidence upon which he bases a finding, and the validity of his finding does not depend on what an appellate court thinks he has in mind at the moment; he is presumed to have the whole record in mind."

Furthermore, the rule has been often stated that all intendments are in favor of upholding the judgment of

the trial court and it is presumptively correct on all issues. *Wick v. Keshner,* 244 F. 2d 146. (See also Pet. App. E, pp. 51-53).

In the instant case, the trial court exercised its judicial discretion and there is no claim by respondents that it abused its discretion. This Court stated in *Fay v. Nola, supra,* (p. 438).

> "Discretion is implicit in the statutory command that the judge after granting the writ and holding a hearing of appropriate scope 'dispose of the matter as law and justice require', 28 U.S.C. Sec. 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles."

4. This Court Should Grant Certiorari Herein to Settle Important Questions of Law and Resolve Conflicts in the Decisions of the Appellate Court.

We have discussed this point in the petition for certiorari under the headings of "Questions Presented" (7-8) and "Reasons for Granting the Writ" (12-13) as well as in our Argument (14-35), so we shall only briefly discuss it.

The very fact that the respondents make contentions contrary to the cases cited by petitioners and cite cases upon which they base their contentions, shows that there is a conflict, or at least an apparent conflict, in appellate court decisions which must be resolved.

The circuit court disagreed with the interpretation and effect of this Court's decision (*Marchese v. United*

States, 374 U.S. 101) (Pet. pp. 7, 12) and with the contentions of both petitioners and respondents as to the meaning and application of the Sanders decision (App. D, pp. 7-12); and this disagreement should be resolved and determined by this Court.

The question as to the extent of the relief the district courts may grant including reduction of sentence either under habeas corpus (Sec. 2243) or the motion procedure (Sec. 2255) or both together has never been determined by this Court and it should do so for the guidance of federal courts in the future.

While the cases of *Lopez v. United States,* 373 U.S. 427, and *Silverman v. United States,* 365 U.S. 505 impliedly overruled the case of *OnLee v. United States,* with respect to testimony obtained through the use of an electronic transmitter, this Court has rendered no positive decision whether or not such use is violative of the Fourth and Fifth Amendments of the Constitution. In *Massiah v. United States,* 374 U.S. 805, the Court stated that, since the case was reversed for violation of the rights under the Sixth Amendment, it was not passing upon rights allegedly violated through the use of the electronic transmitter. It thus seems necessary that this Court definitely resolve and settle this important question by granting certiorari, and rule definitely, as implied in the *Lopez* case, that such use was in violation of the Fourth and Fifth Amendments.

This Court should also determine and settle the extent of the judicial discretion exercisable by the district courts under Section 2255 as compared with habeas corpus.

And finally, this Court should determine whether perjury and the knowing use by the prosecution of per-

jurious testimony of government witnesses, can be established and proved by circumstantial evidence and inferences drawn by the trial court from established facts in order to come within the rule of *Napue v. United States,* 360 U.S. 264.

Conclusion.

In conclusion we respectfully submit (1) that in the instant case there was a violation of petitioner's constitutional rights in several particulars; (2) that even if there was a violation in only one particular, and the finding as to one was supported by the evidence, the judgment of conviction of petitioners was subject and vulnerable to collateral attack; (3) that, therefore, the trial court could grant such relief as would be fair and equitable as "law and justice might require"; (4) that the trial court in the granting of relief could treat the proceedings interchangeably as a motion under Section 2255 or as a petition for habeas corpus under Section 2243 of Title 28 U.S.C., and if the granting of relief can be supported under either section, the judgment must be upheld; (5) that the primary intent of the trial court was to vacate the judgment and discharge the petitioners for the time served, and the reduction of their sentences was incidental and in support of such intent and to fortify its judgment of discharge; (6) that by reason of the infringement of petitioners; constitutional rights, whether in one or several particulars, and by reason of their excellent prison records it was fair and equitable and serving the ends of justice to discharge them for the time served (approximately 4½ years in each case); and (7) that the said judgment of the trial court in the exercise of its discretion as authorized by both habeas corpus under

Sec. 2243 and the motion under 2255, and by this Court's decision granting certiorari in Marchese and remanding the case to the district court for reconsideration, should be upheld and the decision of the court of appeals reversed.

We further respectfully submit that, if this court should determine that the reduction of the sentences of petitioners to be beyond the jurisdiction of district court, it should remand the case to the district court with instructions to modify its judgment by elimination the portion pertaining to reduction and to order the vacation of the judgment of conviction and discharge petitioners for the time served as intended.

Respectfully submitted,

BURTON MARKS,
Attorney for Petitioner Michele Marchese,

SOL C. BERENHOLTZ,
Of Counsel,

RUSSELL E. PARSONS,
Attorney for Petitioner, Jesse Del Bono.